No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,
vs.
TWOHY BROTHERS COMPANY, a Corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon

REPLY BRIEF OF APPELLANT

CHARLES A. HART,
Attorney for Appellant

L. B. DA PONTE,
CAREY, HART, SPENCER & MCCULLOCH,
Of Counsel

SUBJECT INDEX

TABLE OF AUTHORITIES

TEXTBOOKS

No. 8594

United States Circuit Court of Appeals

For the Ninth Circuit

NORTHERN PACIFIC RAILWAY COMPANY, a Corporation,
Appellant,
vs.
TWOHY BROTHERS COMPANY, a Corporation,
Appellee.

Upon Appeal from the United States District Court for the District of Oregon

---

REPLY BRIEF OF APPELLANT

This appeal challenges the correctness of rulings of the District Court with respect to the second and third claims of the complaint. Both charge breach of contract. Whether or not there was the breach claimed turned altogether upon the interpretation to be given the contract. The District Court accepted plaintiff's theory of the contract and denied defendant's motion

for rulings interpreting the contract against plaintiff's contentions.

Plaintiff's discussion, in its answering brief as appellee, of these two questions of contract interpretation is addressed for the most part to the specific points made in appellant's opening brief. As to these points, appellant's position has been fully stated and need not be repeated here. Before undertaking such reply as may be necessary, we first proceed to answer the argument that the record here is inadequate to present the questions sought to be reviewed.

I

THE PROCEDURAL QUESTION

Defendant's Assignments of Error present only questions of contract interpretation which were submitted to and ruled upon by the District Court.

Defendant's appeal asks this Court to review rulings of the District Court upon questions of contract interpretation which were submitted to the District Court during the trial by an appropriate motion. Plaintiff is in error in its assumption that any question of the sufficiency of the evidence to sustain findings is involved. Except for one finding not of importance here (see Appellant's Opening Brief, p. 15), defendant has no criticism whatsoever of the findings upon any question of fact involved. Defendant's griev-

ance is that the conclusions of law and the judgment entered thereon are erroneous, not because of lack of evidence to sustain any finding of fact, but because the District Court misinterpreted the contract between the parties.

Plaintiff's complaint alleged (1) that the contract gave it the right to handle the log traffic which was moved over a part of the new road between certain dates, and that defendant's refusal to permit this was a breach of contract, and (2) that the contract made certain prices applicable to the hauling of all bridge material, and that defendant's refusal to pay these prices was a breach of contract (R. pp. 18-23). Defendant's answer denied that the contract gave plaintiff the rights claimed, and alleged that what defendant had done, both with respect to the log traffic and the bridge material haul, was within its rights under the contract (R. pp. 35-42).

The questions thus presented by the pleadings, whether there were the breaches of contract claimed, were issues of law turning solely upon the interpretation to be given the contract. The facts were not in dispute; defendant had refused to permit plaintiff to handle the log traffic, and had refused to pay the prices claimed to be applicable to the bridge material haul. If plaintiff's theory of the contract was correct,

it was necessary only to determine the amount of the recovery. If, on the other hand, defendant's interpretation of the contract were accepted, there could be no recovery upon either of the two claims.

At the trial and before final submission of the case, defendant moved the Court to adopt conclusions of law declaring (1) that the contract did not give plaintiff the right claimed to conduct transportation operations, and that defendant had acted within its legal rights under the contract in taking possession of the railroad and in conducting operations thereon, and that plaintiff's rights as contractor did not extend to the hauling of log traffic accepted for transportation by defendant after it had taken possession of its line, and that defendant, in taking over the railroad and conducting log transportation thereon, did not breach its contract with plaintiff (R. pp. 179, 182-184), and (2) that plaintiff was not entitled, under the terms of the contract, to any additional payment for hauling bridge materials, and that the contract, correctly interpreted, entitled plaintiff to payment at the rate at which payment had theretofore been made, and also that the decision of the Chief Engineer against plaintiff's contention, made during the progress of the work, was binding and conclusive (R. pp. 251, 253-254).

Defendant's motion for the adoption of these conclusions of law was taken under advisement by the District Court and later denied. A specific exception was taken to the rejection of each of the conclusions requested (R. pp. 182-184, 253-255). And defendant likewise specifically excepted to each of the rulings of the District Court which interpreted the contract according to plaintiff's contentions (R. pp. 189-191, 256-258). Each of these exceptions was directed specifically toward the particular ruling challenged. Their sufficiency for the purpose intended is not open to question under the rule of the cases cited by plaintiff, which deal with general exceptions to findings upon fact issues.

Thus defendant preserved these questions of contract interpretation in the two ways which have many times been approved by the Supreme Court and by the Circuit Courts of Appeal: (1) The propositions of law were presented to the Court during the progress of the trial, and rulings obtained upon them, to which rulings specific exceptions were taken, and (2) specific exceptions were taken to the rulings upon these questions in the special findings and conclusions of law adopted by the trial court.

Ever since the warning of Judge Taft in *Humphreys v. Third National Bank*, 75 Fed. 852, 855,

that the rule applicable to the review of findings upon fact issues was a "very technical and severe" one which regrettably had "proved a trap to counsel" (p. 856), the courts have been careful to point out that questions of law are reviewable if the questions had been submitted to and ruled upon by the trial court, or if they were separately stated in the findings and conclusions adopted and specific exceptions thereto had been taken.

Fleischmann Co. v. United States, 270 U. S. 349, 46 S. Ct. 284;
Arthur C. Harvey Co. v. John F. Malley et al., 288 U. S. 415, 53 S. Ct. 426.

In the *Fleischmann* case (270 U. S. 349, 356) the Supreme Court said:

> " . . . To obtain a review by an appellate court of the conclusions of law a party must either obtain from the trial court special findings which raise the legal propositions, or present the propositions of law to the court and obtain a ruling on them. *Norris v. Jackson*, supra, 129; *Martinton v. Fairbanks*, supra, 673. That is, as was said in *Humphreys v. Third National Bank*, supra, 855, 'he should request special findings of fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by

> the court from the facts found he should have them separately stated and excepted to.' "

Defendant here took both of the steps presented. The propositions of law were presented to the Court during the trial, and at its conclusion exceptions were taken to the particular conclusions of law which decided the questions of contract interpretation involved. And the petition for appeal was supported by assignments of error which challenged the rulings of law upon the questions so presented. We refer particularly to Assignments VII (R. p. 354), XI, XII, XIII, XIV (R. pp. 357-360), XX (R. pp. 363-364), XXIII, XXIV and XXV (R. pp. 365-367).

Plaintiff's brief ignores these Assignments, and refers only to others which are directed to matters in the findings; and upon the assumption that the questions of contract interpretation were issues of fact, disposed of by the findings, it is said that the sufficiency of the evidence to support the findings is not open to inquiry here (Answering Brief of Appellee, pp. 3-11).

We have already pointed out that nowhere in the special findings did the trial court undertake to pass upon any issue of fact whatsoever pertaining to the construction to be given the contract upon the ques-

tions here involved (R. pp. 159-172). Indeed, it was made clear in the oral opinion that because the contract provision as to the commercial haul was considered unambiguous, the Court rejected as incompetent testimony the very evidence which plaintiff now says (impliedly at least) is available to support a finding of fact upon this question of contract interpretation (R. p. 336, Answering Brief of Appellee, pp. 3-4).

Some of defendant's assignments were directed to matters in the special findings to which exceptions had been taken. This seemed necessary in order to reach rulings of law appearing in the findings. Finding XV had the following statement (R. pp. 164, 168):

> "The contract gave plaintiff the right to conduct commercial hauling while the line was under construction and was breached by defendant . . . The log haul was commercial business. To do it was required of the plaintiff under its contract, and the plaintiff was entitled to perform same."

Defendant excepted to these rulings in the finding as follows (R. pp. 189-190):

> "To the conclusion and decision of the Court stated in Finding of Fact No. XV to the effect that the contract between the parties gave plaintiff the right to conduct commercial haul while the line was under construction, and was breached by defendant in the manner stated in said finding of fact; and to the conclusion stated

> in said finding of fact that plaintiff was entitled to conduct log transportation for Clearwater Timber Company as commercial business."

Similarly, Finding XIX, on the subject of the Bridge Material Haul, stated the Court's interpretation of the contract and the conclusion that defendant's refusal to pay at the rates held applicable was a breach of contract (R. p. 255). To these rulings defendant excepted as follows (R. p. 256):

> "To the conclusion of the Court as stated in Finding of Fact No. XIX that the stipulations of the contract between the parties fixing specified prices for hauling piles, timber, and metal fastenings were breached by defendant, and to the conclusion as stated in said finding of fact that said materials were not commercial haul to be paid for at the contract prices for hauling commercial freight."

Defendant had no control over the form of the findings entered. They were prepared and submitted by plaintiff. Their adoption by the Court, with these conclusions of law included, cannot operate to change questions of interpretation of a written contract into issues of fact or to deprive defendant of its right to have the Court's rulings upon them reviewed here.

The case was not free from procedural difficulties, due to the inclusion in one cause of action of four widely dissimilar claims. The first involved many

issues of fact to which almost twenty-two hundred pages of testimony were directed in the preliminary hearing before the Auditor. The last claim was conceded, the amount of recovery having been agreed upon at the preliminary hearing. The question of liability upon the two remaining claims (those involved in this appeal) turned upon the interpretation to be given the contract.

In this situation requests for declarations of law as to the meaning of the contract, and exceptions to the particular rulings and conclusions of law in which the Court's interpretation of the contract was stated, seemed the appropriate if not the only method of bringing the questions directly and specifically to the attention of the trial court. The pleadings stated the opposing contentions of the parties as to their contract rights, both as to the transportation of commercial traffic and the bridge material haul. The resulting issues of law were specifically considered and passed upon. Nothing further could have been done by defendant to give the trial court any greater opportunity to correct the rulings upon these issues which defendant considers erroneous. Defendant is therefore entitled to have the errors corrected in this Court.

II

COMMERCIAL HAUL CLAIM

1. The contract and its specifications, read together, obligated plaintiff to include in its work trains such cars of commercial traffic as defendant might accept for transportation during completion of the construction work. The contract did not obligate defendant to accept any such traffic nor to use plaintiff's facilities for handling any traffic other than cars accepted for transportation while the construction work continued.

We have indeed failed to make our position clear if (as stated at page 12 of appellee's brief) our opening brief can be read as contending that the contract rights and obligations as to the commercial haul are to be determined without reference to the specifications attached to the contract. Just the opposite appears from our analysis of the contract proper and the specifications (Brief of Appellant, pp. 23-30).

It is the office and function of the specifications of a building contract to explain and make definite the work which is described in general terms in the contract. 4 Elliott on Contracts, Sec. 3620. Here the work was generally described as "clearing, grubbing, grading, culverts, bridging, tunnels, tracklaying and ballasting and all other work for which prices are hereinafter named" (R. p. 52). Operation of trains handling commercial traffic, after completion of tracklay-

ing, was not provided for. But the "other work" which the contractor might be called upon to do included what was referred to in one of the price items as "Handling, . . . all commercial business . . . " (R. p. 63).

The specifications explain and limit this obligation. After tracklaying and during the finishing work, the contractor was required to furnish some, but not all, of the work train service needed; and *in its work trains*, the contractor was obligated to haul, at a price of $1 per car mile, cars of commercial traffic accepted for transportation by the Railway Company (R. pp. 122-123).

The meaning of the contract and specifications, read together, is perfectly clear. Plaintiff obligated itself to build a branch line of railroad but undertook no obligation to conduct operations upon it, other than the operation of some of the work trains required in track completion work. And in this work train operation, and while the track work continued, plaintiff undertook to handle commercial cars whenever defendant desired to have any such cars moved.

The construction of the contract advocated by plaintiff would read into the contract, first, an obligation upon defendant to accept for transportation before completion of the road, an undetermined amount

of commercial traffic and to continue plaintiff in possession of the line after the track work was sufficiently completed for defendant's purposes, in order to permit plaintiff to operate the freight trains required for such traffic, and second, an obligation upon plaintiff to operate such freight trains up to a fixed date, regardless of the status of its construction work.

We submit that the result of any such additions is a distortion of the contract.

2. The contract provision, if construed as contended for by plaintiff, would be unenforceable for lack of mutuality.

Despite direct evidence to the contrary (and the absence of any special finding on the subject), plaintiff says that there is evidence in the record from which it could be inferred that defendant made a commitment, or at least that there was a moral obligation, to Clearwater Timber Company to transport logs for it while the railroad was being built (Brief of Appellee, pp. 26-27); and it is argued that when plaintiff and defendant made their contract in 1925 they had in mind as "commercial business" the log traffic of the Clearwater Company. Plaintiff attempts thus to liken the contract provision for handling "all commercial business" (Price Item 72, R. p. 63) to contract obligations for the sale of the entire output of a producer

or for the purchase of a season's supply of material, which of course do not lack mutuality.

There is a complete answer to this in the letter from defendant to plaintiff dated August 5, 1926, which shows that the question of handling logs before completion of construction was still unsettled at that time; the Clearwater Timber Company was then asking for definite assurances that the transportation service would be provided, beginning on June 1, 1927 (R. pp. 210-211). Commercial log traffic during construction was not in contemplation when the parties contracted in 1925. This is made additionally clear by the specifications which explained what was meant by handling commercial business. The contractor was required to handle any such cars "with his own work train" (R. p. 123).

It is therefore clear that the parties did not contract for the handling of the output or requirements of an established plant or business for a limited period, as in the cases relied on by plaintiff. They contracted merely for the handling, in work trains in operation during construction, of such cars as defendant chose to accept for transportation. This was an incident of the construction work contracted for, and the obligation was enforceable only as such. If interpreted as an independent undertaking for conducting

transportation service, it would be void for want of mutuality. See *Imperial Refining Co. v. Kanotex Refining Co.*, 29 Fed. (2d) 193, in which the court (at page 195) said:

> "When the quantity of a commodity to be delivered or received under a contract of sale rests in the uncontrolled will or desire of one of the parties, mutuality is lacking."

As to the contention that plaintiff had the log haul in mind when submitting its bid for the construction of the line (Brief of Appellee, p. 16), it is only necessary to add that if plaintiff did attempt to outmaneuver defendant and the other bidders for the work by putting in an unbalanced bid, expecting to offset a reduction in its solid rock price with log haul profits (evidence of this was rejected by the trial court, R. p. 336), its expectation was not made the subject of a commitment in the contract. What was said by the Supreme Court in *Maryland v. Railroad Company*, 22 Wall. 105, 112, is much in point:

> "There is a well recognized distinction between the expectation of the parties to a contract and the duty imposed by it. Were it not so, the expectation of results would always be equivalent to a binding engagement that they should follow."

3. The contract reserved to defendant the right to stop any part of the work at any time.

Plaintiff's argument upon this point is that the "stop work" clause could not be resorted to by defendant to stop a part of the work contracted for, if defendant proposed thereafter to do the part of the work thus stopped itself.

But the language used in this provision of the contract suggests no such limitation upon the right reserved. If hauling commercial log trains was part of the work contracted for, which of course it was not, and if defendant found that it could conduct the operation better through its own forces, the contract clearly permitted the change; and if this affected the contractor disadvantageously, he had his remedy in an offsetting increase in the unit prices for the work remaining under the provisions of the final paragraph of the contract (R. p. 72).

None of the cases cited by plaintiff offers any reason why the contract here involved should not be enforced as written. Whatever may be said of contracts which provide merely for discontinuing work, with no provision for compensating the contractor for any resulting disadvantage, a right clearly reserved to

stop any part of the work contracted for, with a provision for the protection of the contractor, applicable to changes or reductions in the work, means what it says, and the owner cannot be accused of bad faith when he takes advantage of it, whatever his reasons or purposes may be.

III

BRIDGE MATERIAL CLAIM

1. Price Item 72 of the contract specifying a price for handling material of the Railway Company, and not the price items for hauling materials to bridge sites, was applicable to rail transportation of bridge materials.

Plaintiff reads Price Item 72 of the contract as applicable only to the transportation of commercial business, which would not include bridge materials belonging to defendant (Brief of Appellee, pp. 35-38). This price item reads as follows (R. pp. 63-64):

> "Handling, . . . all commercial business, material and empty cars of the Company used in commercial service and in the service of other contractors, . . . "

We understand plaintiff's contention to be that the words "used in commercial service . . . " in this sentence qualify both the words "empty cars" and "material," so that the only "material" covered by the price

item would be that used in commercial service or the service of other contractors. There is no comma following the word "material," hence the construction advocated is a possible one.

But plaintiff relies too much upon punctuation, which is "a most fallible standard by which to interpret a writing." *Ewing's Lessee v. Burnet*, 11 Peters 41, 54; 9 L. Ed. 624. The construction of a written contract is determined by the words used, in their relation to each other, and not by the punctuation. *Holmes v. Phoenix Ins. Co.*, 98 Fed. 240.

The term "material" in Price Item 72 would have little if any significance or effect if limited as claimed by plaintiff. It is difficult to see what occasion there would be for the transportation of material used in the service of transporting commercial traffic. We think it clear that Item 72 was intended to provide a price for rail transportation of materials of all kinds, including such material for bridge construction as could be brought to the bridge sites by rail.

2. Parties to a construction contract may stipulate for the submission of questions of contract interpretation to an engineer or architect of the owner.

We challenge plaintiff's assertion that questions of contract interpretation may not be submitted to and

passed upon by an engineer or architect. Such questions are indeed questions of law, as plaintiff here contends (Brief of Appellee, p. 40), contrary to its argument upon the procedural point, where they are treated as issues of fact (pp. 3-5). But whatever their classification may be, it cannot be doubted that in Federal courts at least, any and all questions arising in the performance of the work may be submitted to and finally decided by the engineer or architect. *Memphis Trust Co. et al. v. Brown-Ketchum Iron Works*, 166 Fed. 398. Decisions to this effect cannot be brushed aside upon the theory that they involved "questions of fact of a technical nature properly left to a technical man." See, for example, *Merrill-Ruckgaber Co. v. U. S.*, 241 U. S. 387, where the architect determined the meaning to be given the word "building," and *Smith v. Copiah County*, 239 Fed. 425, in which the engineer's decision as to the meaning of the term "overhaul" was held final and conclusive. *Haskell v. McClintic-Marshall Co.*, 289 Fed. 405 and *McCullough v. Clinch-Mitchell Const. Co.*, 71 Fed. (2d) 17, which hold that broad waivers of all rights to sue are not enforceable, announce no different rule; in the latter of these two cases the arbitration clause was given full effect.

The contract stipulation here involved gave defendant's engineer power to determine which of two possibly conflicting price items applied to the railroad haul of bridge materials. His decision upon this question is not open to review here.

Respectfully submitted,

CHARLES A. HART,

Attorney for Appellant,

Northern Pacific Railway Company.

L. B. DA PONTE,

CAREY, HART, SPENCER & MCCULLOCH,

Of Counsel for Appellant.